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No. 340

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

HAMLIN K. BUCHMAN,
Petitioner,

vs.

CLAIRE MORSE,
Respondent.

(On Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California)

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent concedes, as it must, that the District Court of Appeal, Second Appellate District, State of California, decided in its opinion that the petitioner had been denied due process. The California Court said, 123 C. A. 2d 560, as follows:

> "Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one

before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence on each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly.

The Constitutional right to notice and hearing cannot be taken away in the fashion that was attempted in the present case. The judge's conception of his duty was entirely erroneous. The plainest principles of justice required that appellant be given notice of the specific charges against him. No notice was given him that he was to be removed on the ground that he was so mentally deranged as to be incompetent to act as executor. If the judge had reason to believe from what was told him in chambers, or from appellant's conduct, or from both, that he was incompetent to act, he had the authority to suspend his powers. He had no authority or power, without notice or hearing, to remove him. Appellant was not only not accorded a just, fair, and impartial hearing; he was not accorded the right or opportunity of any hearing, either on the charge that the inventory was not filed in time or on the ground, not charged, that he was so mentally deranged as to be incompetent to act as executor. No legal evidence was produced that he was incompetent to act. He was

denied the opportunity of presenting any evidence. His offer of proof was erroneously rejected. In short, he was denied due process of law."

But, what respondent contends is that other proceedings which the judge thereafter entertained immediately were not affected or infected by the judge's arbitrariness and denial of due process of law. It contends that because the court said that: "It was stipulated that the matters might be heard together and 'that evidence competent in any of the matters may be received and at the end the court will sort it out and make a separate ruling in each matter.' ", relies the respondent of having the matter heard by a judge who was biased and prejudiced.

Respondent relies almost entirely on the later opinion of *Estate of Buchman,* 132 A.C.A. 92, which is the very judgment here under attack. Thus, he seeks to support the judgment under attack by the attacked judgment.

The respondent herein supports his claim that the petitioner was not denied due process of law by reason of the fact that the Superior Court judge holding the same position as the judge under attack found upon an affidavit and counter-affidavit that the trial judge was not biased and prejudiced; but this judge did not have before him the record of the proceedings nor did he have any authority to decide whether the appellant was denied due process. That decision could only come

from the higher appellate courts in California, and that higher appellate court, to-wit, The District Court of Appeal, Second Appellate District, Division Three, did hold that the petitioner was denied due process and the Supreme Court of California unanimously denied a hearing on this decision. Therefore, whether the issues of bias and prejudice were also encompassed in the denial of due process and was considered in that light by the District Court of Appeal when it decided that the judge had denied the appellant due process can only be determined from the language of the District Court of Appeal in this matter.

Implicitly, the opinion of the District Court of Appeal reversed the finding of the trial judge who held this petitioner was not biased and prejudiced, because we cannot conceive of the conduct of the learned judge of the District Court of Appeal as not being an evidence of bias and prejudice in fact.

This Court has repeatedly held that the findings of the lower appellate courts are persuasive upon this Court.

It would have been impossible for a judge in one proceeding to deny the appellant his rights and then in the next proceeding to act within the limits of due process. The judgment of the District Court of Appeal as to the issue of denial of due process is *res judicata* in this proceeding and fatally infected all of the proceedings which were being held by the trial judge under the stipulation "that the matters might be heard together and 'that evidence competent in any

of the matters may be received and at the end the court will sort it out and make a separate ruling in each matter.' " The questions of the qualifications of the trial judge to hear the matter are not involved. He had already commenced to hear the matters, and in the middle of the proceeding had denied the petitioner due process.

Respondent repeatedly reverts to the subsequent opinion which we here attack, to-wit, 132 A.C.A. 92. What we contend is that fairness of trial is a due process question. California has already decided that appellant was denied due process by the trial judge in this case. The question, therefore, is whether that same judge should have (instead of proceeding to try the other matters) continued the matter until the District Court of Appeal decided whether his conduct was such as permitted him to continue the trial thereof. Instead of doing so, he went ahead.

Respondent cites proceedings in the Superior Court. None of these proceedings involve due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Superior Court judge did not pass upon this issue, and the issue of denial of due process of law was raised by the petitioner in the only court in which it was raised, and the petitioner was upheld.

Respondent is in error in trying to pretend the proceedings of March 11th and 13th therefore did not affect the proceedings which continued to be heard on the same joint proceeding.

Respondent makes reference to *Offutt v. United States,* 99 Adv. Sup. Rep. 1, 7 which it attempts to distinguish. In *Offutt v. United States* this court pointed out that: This court is "with the fair administration of justice. . . . The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two." It would appeal that this description would well fit the actions between the trial judge and the petitioner here, on the proceedings on March 11th and 13th, which was the beginning of the hearings to which objections have been made.

We respectfully submit that these necessarily infected the subsequent proceedings fatally and rendered them null and void.

We respectfully pray for hearing herein and reversal of the judgment and order below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner.